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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 GLENN DARNELL DEAN,
10 Petitioner,
11 vs.
12 DWIGHT NEVEN, et al.,
13 Respondents.

Case No. 2:12-cv-00323-JCM-GWF

ORDER

15 Before the court are the first amended petition for writ of habeas corpus (#12), respondents'
16 motion to dismiss (#26), petitioner's opposition (#30), and respondents' reply (#32). The court
17 finds that petitioner has not exhausted the available state-court remedies for all of his grounds for
18 relief, and the court grants the motion.

After a jury trial, petitioner was convicted in state court of conspiracy to commit kidnaping, first-degree kidnaping, and robbery with the use of a deadly weapon. Ex. 12 (#13). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 23 (#14).

Petitioner then filed in state district court his first post-conviction habeas corpus petition. Ex. 27 (#14). Later, he filed three documents titled “First Amendment Petition.” Ex. 28 (#14), Ex. 29 (#14), Ex. 31 (#15). Then he filed a motion for leave to supplement the petition. Ex. 50 (#15). The state district court held an evidentiary hearing; it denied the petition at the end of the hearing. Ex. 59 (#15). The written findings of fact, conclusions of law, and order then followed. Ex. 67 (#15). Petitioner appealed. The Nevada Supreme Court affirmed without briefing but after obtaining the trial court record and the transcript of the evidentiary hearing. Ex. 70 (#15).

1 Petitioner litigated pro se during these proceedings. There were other proceedings in state court
2 subsequent to the first state habeas corpus petition, but they are not relevant to the motion to
3 dismiss.

4 Petitioner then commenced this action. The court appointed counsel, who filed the first
5 amended petition (#12). The motion to dismiss (#26) followed.

6 Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must
7 exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a
8 petitioner must fairly present that ground to the state's highest court, describing the operative facts
9 and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan
10 v. Henry, 513 U.S. 364, 365 (1995) (*per curiam*); Anderson v. Harless, 459 U.S. 4, 6 (1982).

11 Ground 1 is a claim that the evidence presented at trial was insufficient to support the guilty
12 verdicts on all charges. Petitioner raised a similar claim on direct appeal, but he limited the claim
13 only to the charge of first-degree kidnaping. See Ex. 19 (#14). The Nevada Supreme Court's
14 decision is limited only to the charge of first-degree kidnaping. See Ex. 23 (#14). The additional
15 challenges to the sufficiency of the evidence for the charges of conspiracy to commit kidnaping and
16 robbery with the use of a deadly weapon fundamentally alter the claim that petitioner presented to
17 the Nevada Supreme Court. See Vasquez v. Hillery, 474 U.S. 254, 260 (1986). Ground 1 is
18 unexhausted to the extent that it challenges the sufficiency of the evidence to support the verdicts on
19 conspiracy to commit kidnaping and robbery with the use of a deadly weapon.

20 Ground 2(A) is a claim that trial counsel provided ineffective assistance by failing to
21 investigate and obtain petitioner's medical records, which would have shown that he was suffering
22 from a separated shoulder at the time of the events in the case. Petitioner did not present this claim
23 in his state habeas corpus petition. Petitioner's statement of exhaustion directs the court to
24 paragraph or part B of his first state habeas corpus petition, but that is a claim that counsel failed to
25 investigate and to file a motion pursuant to Brady v. Maryland, 373 U.S. 83 (1963), to obtain
26 clothing worn by the victim and photographs of the victim's injuries. Ex. 27, at 3-4 (#14). The
27 change in facts from state petition to federal petition fundamentally alters the claim. See Hillery,
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1 474 U.S. at 260. Petitioner's other purported claims of exhaustion have nothing to do with the
2 medical records or counsel's investigation.

3 Ground 3 is a claim that appellate counsel provided ineffective assistance because counsel
4 did not raise on direct appeal a claim that the trial court erred in precluding the defense from
5 questioning the complaining witness about impeachment material. Petitioner did not present this
6 claim in his state habeas corpus petition. Petitioner's statement of exhaustion directs the court to
7 paragraph or part G of his first state habeas corpus petition, but that is a claim that appellate counsel
8 should have raised the issue of incorrect calculation of pre-sentence confinement credits. Ex. 27, at
9 15-19 (#24). The change in facts from state petition to federal petition fundamentally alters the
10 claim. See Hillary, 474 U.S. at 260.

11 Petitioner also argues that he presented these claims through testimony and argument in his
12 state-court evidentiary hearing, the transcript of which was in the Nevada Supreme Court's
13 possession. See Ex. 59, at 56-64 (ground 2(A)), 107-14 (ground 3) (#15). Petitioner also notes that
14 the state district court ruled on these claims in its final written order. See Ex. 67, at 3 (paragraphs
15 11 and 17). Those paragraphs are ambiguous, particularly if they are read without any knowledge of
16 what occurred during the evidentiary hearing. The court agrees with respondents that these
17 arguments are foreclosed by Baldwin v. Reese, 541 U.S. 27, 30-32 (2004), which held that a person
18 does not fairly present a claim to a state court if that court must read beyond the petition or brief that
19 does not alert the state court to the claim. The Nevada Supreme Court could have read the state
20 district court's decision, and the Nevada Supreme Court could have read the transcript, and the
21 Nevada Supreme Court could have recognized that petitioner was presenting new claims in the
22 evidentiary hearing, but Reese held that exhaustion requires petitioner to put the claims squarely in
23 front of the Nevada Supreme Court and not to rely on what the Nevada Supreme Court could have
24 done.

25 The court is not persuaded by petitioner's argument that Reese is inapplicable in this case
26 because there was no briefing in the Nevada Supreme Court. The lack of appellate briefing does not
27 mean that petitioner was unable to present his claims to the Nevada Supreme Court; instead, the
28 Nevada Supreme Court could use the first state habeas corpus petition as its operative document.

1 Furthermore, even if petitioner was allowed to file a brief in his habeas corpus appeal, he would
 2 have run into another problem if he had raised the issues now contained in grounds 2(A) and 3 in
 3 that brief. The Nevada Supreme Court has held that it need not consider grounds not raised in a
 4 post-conviction habeas corpus petition. Davis v. State, 817 P.2d 1169, 1173 (Nev. 1991), overruled
 5 on other grounds by Means v. State, 103 P.3d 25, 33 (Nev. 2004). “Submitting a new claim to the
 6 state’s highest court in a procedural context in which its merits will not be considered absent special
 7 circumstances does not constitute fair presentation.” Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir.
 8 1994) (citing Castille v. Peoples, 489 U.S. 346, 351 (1989)). If petitioner had been allowed to file a
 9 brief in his habeas corpus appeal, and if petitioner did raise in those briefs the issues that he raises
 10 now in grounds 2(A) and 3, then the Nevada Supreme Court’s application of Davis would mean that
 11 those grounds still would not be exhausted.¹ Therefore, petitioner’s inability to file an appellate
 12 brief does not excuse the exhaustion requirement.

13 The first amended petition (#12) is mixed, containing both claims exhausted in state court
 14 and claims not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S.
 15 509, 521-22 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983).

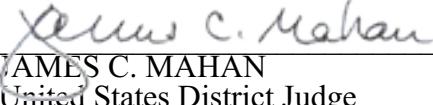
16 IT IS THEREFORE ORDERED that respondents’ motion to dismiss (#26) is **GRANTED** in
 17 part. Grounds 2(A), 3, and part of 1 as described above are unexhausted.

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 27 ¹If the Nevada Supreme Court did consider those issues on their merits, then exhaustion
 28 would not be an issue.

1 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry
2 of this order to file a motion for dismissal without prejudice of the entire petition, for partial
3 dismissal of grounds 2(A), 3, and the unexhausted part of ground 1, or for other appropriate relief.
4 Within ten (10) days of filing such motion, petitioner must file a signed declaration under penalty of
5 perjury pursuant to 28 U.S.C. § 1746 that he has conferred with his counsel in this matter regarding
6 his options, that he has read the motion, and that he has authorized that the relief sought therein be
7 requested. Failure to comply with this order will result in the dismissal of this action.

8 DATED: March 18, 2014.

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11 JAMES C. MAHAN
12 United States District Judge
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